

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. GONZALEZ

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STATE OF NEBRASKA, APPELLEE,
V.
JOSE E. GONZALEZ, APPELLANT.

Filed August 28, 2012. No. A-12-073.

Appeal from the District Court for Dakota County: PAUL J. VAUGHAN, Judge. Affirmed.

Jose E. Gonzalez, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Jose E. Gonzalez was convicted by a jury of first degree sexual assault. He appealed, and we affirmed the conviction in a memorandum opinion. See *State v. Gonzalez*, No. A-10-179, 2010 WL 4241022 (Neb. App. Oct. 26, 2010) (selected for posting to court Web site). Gonzalez then brought an action seeking postconviction relief, which was denied by the district court without an evidentiary hearing and without the appointment of counsel. Gonzalez now appeals those denials. We find no merit to the appeal, and we affirm.

II. BACKGROUND

The background of this case concerning Gonzalez' sexual assault of his 14-year-old stepdaughter is set forth in our prior memorandum opinion and need not be iterated here.

On September 28, 2011, Gonzalez filed a pro se motion for postconviction relief. In the motion, Gonzalez alleged that he was entitled to postconviction relief because of various instances of "judicial misconduct," because he had received ineffective assistance of trial

counsel, because he had received ineffective assistance of appellate counsel, and because of various other constitutional violations.

On January 4, 2012, the district court entered an order denying Gonzalez' motion for postconviction relief. The district court found that Gonzalez had not raised any issues that were not either raised in his direct appeal or available to be raised in his direct appeal, and the court also refused to grant an evidentiary hearing or appoint counsel. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Gonzalez has assigned three errors. He asserts that the district court erred in denying him postconviction relief, in not granting an evidentiary hearing, and in not appointing counsel to represent him.

IV. ANALYSIS

1. POSTCONVICTION RELIEF

Gonzalez first asserts that the district court erred in denying his request for postconviction relief. In the motion, Gonzalez alleged that he was entitled to postconviction relief because of alleged instances of judicial misconduct during his trial, because he received ineffective assistance of trial counsel, because he received ineffective assistance of appellate counsel, and because of other alleged constitutional violations. We find no merit to Gonzalez' assertions and find that the district court did not err in denying relief.

A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). The petitioner must allege facts which, if proven, show that the petitioner's constitutional rights were violated. *Id.*

(a) Judicial Misconduct

The first basis for postconviction relief asserted by Gonzalez is that there were various instances of judicial misconduct during his trial. Among the assertions are claims that the trial judge erred in granting the State's motions to continue, denying Gonzalez' request to call a particular witness, allowing the State to call a particular witness, and granting the State's motion in limine. Gonzalez has not alleged any facts to demonstrate that these alleged errors were unknown or unavailable to him at the time of his direct appeal, and he is procedurally barred from raising them in this postconviction proceeding.

Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010). A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct appeal. *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011); *State v. Lee*, *supra*. No matter how they may be phrased or rephrased, if issues raised in a motion for postconviction relief were or could have been litigated on direct appeal, the defendant is procedurally barred from using them as a basis for postconviction relief. *State v. Boppre*, *supra*.

Each of these alleged instances of error by the trial court were or should have been known to Gonzalez at the time of his direct appeal. Because Gonzalez has not asserted any facts

to demonstrate why these claims were not known or otherwise unavailable to him to be litigated at the time of his direct appeal, he is barred from raising them in this proceeding. The district court did not err in denying relief on this basis.

(b) Ineffective Assistance of Trial Counsel

The second basis for postconviction relief asserted by Gonzalez is that his trial counsel was ineffective. Gonzalez raised a variety of claims of ineffective assistance of trial counsel on direct appeal, and we found the record at that time insufficient to allow a meaningful review of the issues. See *State v. Gonzalez*, No. A-10-179, 2010 WL 4241022 (Neb. App. Oct. 26, 2010) (selected for posting to court Web site). We now find that, in his postconviction motion, Gonzalez has failed to allege sufficient facts to demonstrate that he is entitled to relief.

A claim that defense counsel provided ineffective assistance of counsel presents a mixed question of law and fact. *State v. Hessler*, *supra*. On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *Id.* Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that are reviewed on appeal independently of the lower court's decision. *Id.*

The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must support that claim. *Id.* Specifically, the defendant must show, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Hessler*, *supra*. Second, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case; that is, there was a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id.*

In determining whether trial counsel's performance was deficient, courts give counsel's acts a strong presumption of reasonableness. *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). In addressing the "prejudice" component of the *Strickland* test, appellate courts focus on whether counsel's allegedly deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *State v. Iromuanya*, *supra*.

In assessing postconviction claims that trial counsel was ineffective, the Nebraska Supreme Court has upheld dismissal of the postconviction motion where the motion did not include specific factual allegations to support the claim. See *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010). In the absence of specific allegations, the trial court does not err in denying relief. *Id.*

In his motion for postconviction relief, Gonzalez asserted that his trial counsel had been ineffective in a variety of ways. These assertions included a variety of claims related to his trial counsel's actions concerning DNA evidence and failing to seek testing for the presence of "sliver" (which we assume to mean "saliva"), as well as trial counsel's actions concerning witnesses who might have provided testimony about a "notch" in the victim's hymen revealed by a doctor's examination and witnesses who allegedly provided hearsay testimony. These assertions were also raised by Gonzalez' appellate counsel in the direct appeal, but the record presented on direct appeal was insufficient to allow a meaningful review of the claims.

Now, in his pro se postconviction motion, Gonzalez has failed to allege sufficient facts to demonstrate that he is entitled to relief. He has not alleged sufficient facts to demonstrate that his trial counsel's actions were deficient performance, how counsel might have acted differently, or how different conduct might have resulted in any different outcome. For example, although Gonzalez argues repeatedly that his counsel erred in not seeking DNA testing to look for the presence of saliva, he has not alleged facts to demonstrate what the likely outcome of such examination might have been or how the result, whether positive or negative, would have resulted in a different outcome in his trial. Similarly, although he argues that his counsel erred in not objecting to testimony about the "notch" in the victim's hymen and in not presenting testimony of a witness who might have been able to offer an alternative explanation for the notch's presence, he has not alleged facts to demonstrate why an objection would have been successful, that other evidence would have been admissible, or that different conduct by his trial counsel would have resulted in a different outcome in his trial.

Gonzalez has asserted a variety of conclusions alleging that his trial counsel was ineffective. Gonzalez has failed to allege sufficient facts to demonstrate that his counsel was in fact deficient or that such allegedly deficient performance prejudiced Gonzalez and rendered the result of his trial unreliable or fundamentally unfair. The district court did not err in denying postconviction relief on this basis.

(c) Ineffective Assistance of Appellate Counsel

The third basis for postconviction relief asserted by Gonzalez is that his appellate counsel was ineffective. Among the assertions of ineffective assistance of appellate counsel are claims that his appellate counsel erred in not sufficiently challenging the effectiveness of his trial counsel and in not sufficiently raising all issues that could have been raised on direct appeal. We have already concluded that Gonzalez has failed to demonstrate that his trial counsel was ineffective, and he has therefore also failed to demonstrate that his appellate counsel was ineffective in challenging his trial counsel's effectiveness. With respect to the remaining assertions of ineffective assistance of appellate counsel, Gonzalez has failed to assert sufficient facts to demonstrate that he is entitled to relief.

When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the *Strickland* test. *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). Obviously, if trial counsel was not ineffective, then the petitioner suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim. *Id.*

To the extent Gonzalez bases his assertion of ineffective assistance of appellate counsel on claims that his appellate counsel failed to sufficiently raise assertions that his trial counsel had been ineffective, our conclusion above that Gonzalez has failed to sufficiently demonstrate that his trial counsel was ineffective is dispositive. Because he has failed to demonstrate that he had any challenges to the effectiveness of his trial counsel that were meritorious, he has similarly failed to sufficiently demonstrate that appellate counsel was ineffective in his challenges to trial counsel's ineffectiveness.

To the extent Gonzalez bases his assertions of ineffective assistance of appellate counsel on other grounds, including his claims that appellate counsel failed to sufficiently raise other

issues on direct appeal, he has not alleged sufficient facts to demonstrate that any other claims had merit or that the outcome of his appeal would have been different had appellate counsel acted differently. The district court did not err in denying postconviction relief on this basis.

(d) Other Constitutional Violations

The final basis for postconviction relief asserted by Gonzalez is that he was entitled to relief because of constitutional violations. In his motion, Gonzalez lists several alleged constitutional violations, including violations of his right “to summon defense witnesses,” his right “to gather and submit favorable defense evidence,” his right to effective assistance of counsel, and his right to “perserve [sic] errors.” Except as set forth with respect to the above assertions concerning judicial misconduct and ineffective assistance of counsel, Gonzalez provides no more specific assertions or factual representations concerning this alleged basis for relief. The district court did not err in denying postconviction relief on this basis.

2. EVIDENTIARY HEARING

Gonzalez next assigns as error that the district court erred in dismissing his motion for postconviction relief without granting an evidentiary hearing. As we concluded above, Gonzalez has not presented sufficient facts to raise any justiciable issue of whether he is entitled to postconviction relief. As such, the district court did not err in denying him an evidentiary hearing.

An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations that, if proven, constitute an infringement of the movant’s rights under the Nebraska or federal Constitution. *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). When a defendant makes such an allegation, a court may deny an evidentiary hearing only when the records and files affirmatively demonstrate that the defendant is entitled to no relief. *Id.*

In the present case, Gonzalez’ motion affirmatively demonstrates that he is entitled to no relief. As discussed above, some of his assertions are procedurally barred and he has failed to allege sufficient facts to demonstrate an entitlement to relief on the remaining assertions. The district court did not err in denying him an evidentiary hearing.

3. APPOINTMENT OF COUNSEL

Finally, Gonzalez asserts that the district court erred in not appointing counsel to represent him. We disagree and find no abuse of discretion because, as previously determined, Gonzalez has not presented a justiciable issue of fact or law.

In the absence of a showing of an abuse of discretion, the failure to provide court-appointed counsel in postconviction proceedings is not error. *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010). When the assigned errors in a postconviction petition before a district court contain no justiciable issues of fact or law, it is not an abuse of discretion to fail to appoint counsel. *Id.*

Having found that Gonzalez has not presented a justiciable issue of fact or law demonstrating that he is entitled to postconviction relief or entitled to an evidentiary hearing, we

also conclude that the district court did not abuse its discretion in denying him the appointment of counsel.

V. CONCLUSION

We find no merit to Gonzalez' assertions on appeal. The district court did not err in denying postconviction relief, in denying an evidentiary hearing, or in denying the appointment of counsel. We affirm.

AFFIRMED.